Federal Communications Commission

Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
	)	CC Docket No. 01-92
	)	
Developing a Unified Intercarrier	)	
Compensation Regime	)	

North County Communications' Comments to Notice of Proposed Rulemaking

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SUMMARY

In the current proceeding, the Federal Communications Commission has solicited comments concerning its intention to adopt a nationwide bill-and-keep regime of intercarrier compensation, as well as comments concerning other recent "interim" actions by the Commission. It is apparent that this Commission intends to do as it pleases, regardless of the merits of its "proposals" or the outcry against it. In adopting orders without public notice, denying actions will be taken only to turn around and contradict those statements within a month's time, and in soliciting the assistance of long-distance carriers that it regulates in response to legal challenges to its actions, the Commission adopts a "Washington-knows-best" attitude which undermines the competitive spirit of the Telecommunications Act of 1996.

The Commission has no authority to adopt the proposed bill-and-keep regime it proposes. Left to carriers' individual agreement, and the waiver of reciprocal compensation payments, bill-and-keep might be perfectly acceptable. But in the absence of such agreement and waiver, the proposed action is not a proper exercise of rule-making authority; rather, it is one taken in violation of the separation of powers doctrine. Aside from statutory or constitutional restrictions on such action, bill-and-keep deprives CLECs of necessary revenues during the early years of their existence, thwarts innovation, and is destined to increase the cost to consumers for the act of receiving phone calls, be they wanted or unwanted.

The Commission likewise had no authority to deny reciprocal compensation payments to CLECs that service ISP-bound traffic. Recent actions have had the effect of

hindering and encumbering the rights of freedom of association and freedom of speech of millions of Americans who utilize the Internet as a soapbox to the world. The Commission's discriminatory treatment of data messaging v. voice messaging favors ILECs, increases costs, interferes with the free exchange of ideas, and will ultimately kill the Internet.

And finally, by ignoring the obvious differences between large ILECs and small CLECS, the Commission's recent order on CLEC access charges deprives CLECs of a compensatory rate for their services. By ignoring its own recent precedent that rates which exceed local ILEC rates are not per se unreasonable, the Commission exhibited the very type of arbitrary and capricious rule-making authority which epitomizes American businesses' regulatory nightmare. The only way to offset the CLECs disadvantages from higher start-up costs, smaller services areas and limited number of subscribers (in contrast to subsidized ILECs that benefit from economies of scale and paid-for networks) is to institute a sliding scale compensation scheme. Failure to do so will reduce services, kill competition, and ultimately undermine the congressional intent of the Telecommunications Act of 1996. The FCC has made it clear, by its actions, that it intends to protect the "Sacred Cow" (ILECs) with the blood from the "Sacrificial Lamb" (CLECs). There is still time to re-think this disaster in waiting.

We simply cannot accept an argument that the FCC may nevertheless take action, which it thinks will best effectuate a federal policy. An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do.

--Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986)

Some people know the cost of everything and the value of nothing.
--Anonymous

I. The Commission's Actions Reflect the Worst Type of Heavy-Handed Bureaucratic Manipulations Imaginable.

The current Notice of Proposed Rulemaking presents from a federal regulatory body which typifies American businesses' objective fears of the "fourth branch of government." In the Matter of Developing a Unified Carrier Compensation Regime, CC Docket 01-92, Notice of Proposed Rulemaking, FCC 01-132 (rel. April 27, 2001) ("NPRM"). But this NPRM does not stand alone. It stands with two other orders released concurrently on April 27, 2001, the Commission's own "date of infamy."

In the Matter of Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, Order on Remand and Report and Order, FCC 01-131 (rel. April 27, 2001) ("ISP Order"). In the Matter of Access Charge Reform; Reform of Access Charges Imposed by

Competitive Local Exchange Carriers, CC Docket 96-262, Seventh Report and Order, FCC 01-146 (rel. April 27, 2001) ("CLEC Order"). And while these two rulings are ostensibly denominated "interim" and officially remain "on the table" for purposes of this current NPRM [NPRM ¶ 3, ISP Order ¶¶ 3 and 7, CLEC Order ¶ 3], the Commission's actions to date leave little doubt that this body has no intention of reconsidering its position on these orders or on the premise of "bill-and-keep" as a regime of intercarrier compensation.

For example, the ISP order contained a provision that imposed growth caps and barred entry into new markets, resulting in a reciprocal compensation scheme that would result in differential compensation for CLECs. Despite the clear mandate of the Federal Administrative Procedures Act (5 U.S.C. § 533), this provision never appeared in the notice of proposed rulemaking leading up to the ISP order, denying interested parties the opportunity to address significant concerns, and paving the way for unconstitutionally discriminatory treatment of data transmissions.

Or the Commission's disingenuous pronouncement that it would "decline to conclude, in this order, that CLEC rates across the board are unreasonable" [CLEC Order ¶ 34], despite having no hesitation to do so merely one month later in <u>the Matters of AT&T v. Business Telecom, Inc., *et al.*,</u> EB-01-MD-001 and EB-01-MD-002, a decision in which for the first time the Commission engaged in the hitherto unknown practice of retroactive ratemaking (<u>Id</u>., Dissenting Statement of Commissioner Furchtgott-Roth at 29), in a case which had been pending before the Commission for some four months with a decision due on the imminent horizon.

Or when counsel for certain CLECs finally challenged the Commission's CLEC Order after having sought to file a motion for stay with the Commission immediately after the CLEC Order was issued, but were specifically instructed by the Commission *not* to file such a request but instead to file an *ex parte* letter, creating the expectation that the Commission would act sua sponte to stay unworkable portions of the CLEC Order [Mpower Communications Corp. and North County Communications, Inc. v. FCC, Case No. 01-1280 (D.C. Cir. 2001), Petitioners' Emergency Motion for Stay Pending Judicial Review, or, in the Alternative, for Expedited Consideration, at 3], the Commission's knee-jerk reaction was to abdicate any remaining vestige of impartiality it may have been harboring and to actively solicit the assistance of IXCs which the Commission regulates, such as AT&T and Sprint, in fighting against the position of two CLECs. Id., Petitioners' Reply to Response of FCC to Emergency Motion for Stay Pending Judicial Review, or, in the Alternative, for Expedited Consideration, at 1, n. 1, and Petitioners' Reply to Opposition of AT&T and Sprint to Emergency Motion for Stay Pending Judicial Review, at 1, n.1.

Sadly, little exists to suggest anything other than an agency run amok, determined to impose its "Washington-knows-best" thumb on all facets of the local telephone markets, despite clear directions and common sense to the contrary. NPRM, Separate Statement of Commissioner Furchtgott-Roth at 69. In the face of obvious turmoil facing large segments of the CLEC market nationwide, the Commission proposes to destroy Congress's good work in the Telecommunications Act of 1996, bringing down local competition and consumer choice in the process. Gregory Zuckerman, Wrong

Numbers—Telecom Debt Debacle Could Lead to Losses of Historic Proportions, Wall St. J., May 11, 2001, at A1.

Fortunately for American consumers and those dedicated to providing a competitive environment in which to serve them, the Commission has no authority to act in such a heavy-handed fashion.

II. The FCC Has No Authority to Implement Its Proposed Bill-and-Keep Regime on a Nationwide Basis.

In the context of the Telecommunications Act of 1996, Congress specifically addressed the development of competitive markets. 47 U.S.C. § § 251-261. The underlying purpose of this legislation was to allow flexible pricing of services, abolish rate of return regulations, and eliminate pricing regulations. In this context, Congress has already spoken definitively on the subjects of reciprocal compensation and bill-and-keep.

47 U.S.C. § 251 (b) addresses the obligations of local exchange carriers. Subdivision 5 establishes the duty to establish reciprocal compensation arrangements for the transportation and termination of telecommunications.

Bill-and-keep arrangements are covered under 47 U.S.C. § 251 (d) (2) – Charges for transport and termination of traffic:

> (A) IN GENERAL—For the purposes of compliance by an incumbent local exchange carrier with section 251 (b) (5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable, unless—

(i) such terms and conditions provide for the mutual and reciprocal recovery of each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) RULES OF CONSTRUCTION—This paragraph shall not be construed –

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to enlarge in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

Read together, these statutes make clear that the commission has no authority to institute a bill-and-keep regime. Reciprocal compensation is mandated. Bill-and-keep may be instigated <u>only</u> by agreement and <u>only</u> with the <u>waiver</u> of reciprocal compensation. <u>Bell Atlantic Telephone Companies v. FCC</u>, 206 F.3d 1 (D.C. Circuit 2000) makes it crystal clear that "a negotiation process, driven by market forces, is more likely to lead to efficient outcomes than are rates set by regulation." It cannot be imposed by Washington's heavy hand. ISP Order, Dissenting Statement of Commissioner Furchtgott-Roth.

As the Commission may only prescribe such rules and regulations which may be necessary in the public interest <u>to carry out</u> **<u>the provisions</u>** of the Act (47 U.S.C . § 201 (b)), it has no authority to institute the proffered regime of intercarrier compensation which would radically <u>change</u> and <u>alter</u> the statutes of Congress. The Commission can enact rules and regulations which <u>implement or support</u> Congressional actions, but it

cannot contradict or impair those laws passed by Congress and signed into law by the President without acting far in excess of its authority. The Commission may not create new laws and it may not change existing laws. Enacting the proposed bill-and-keep regime would do precisely that.

Article I, § 1 of the U.S. Constitution provides that "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." It is black-letter law that Congress is not permitted to abdicate or to transfer to others essential legislative functions with which it is thus vested. Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935). Unfortunately, the present administrative bureaucracy which weighs down American businesses has become widely recognized as the fourth branch of government. Whether a fourth branch, quasi-legislative, quasi-executive, or quasi-judicial, this Commission may enact rules, if at all, which are valid only as **subordinate** rules, and only when part of a sufficiently defined legislative policy. Id., at 421, 429-429. Accord, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495. That the Telecommunications Act of 1996 is not a model of clarity is a strong warning to this Commission to tread lightly, if at all.

The proposed rule is **not** a proper exercise of rule-making power. It does not seek to implement, augment, or administer legislative policy--it seeks to establish its own legislative policy. The Commission may not enact the functional equivalent of coordinate legislation, thus expanding and redefining the scope of its authority and effectively overruling the statutory scheme with a rule which would subsume and then obliterate the statute. The Commission was never intended to be an omnipotent body reshaping the American telecommunications industry into a model which the Commission, in its "wisdom," decided best served the country.

That the route, which the Commission seeks to follow, is more “efficient” is no excuse for unconstitutional action. For the Commission to propose to enact a rule that effectively nullifies statutes enacted by Congress and signed into law by the President is a gross abuse of power and is a direct assault upon the separation of powers. That Congress and the President have acquiesced to such action is wholly irrelevant. I.N.S. v. Chadha, 462 U.S. 919, 942, n. 13 (1983).

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States. . . . Article 1, § 7, cl. 2. Every Order, Resolution, or Vote to which the Concurrence of the Senate and the House of Representatives may be necessary (except on the question of adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives. . . . Article 1, § 7, cl. 3. These provisions of Article I are integral parts of the constitutional design for the separation of powers, not simply abstract generalizations in the minds of the Framers of Constitution. I.N.S. v. Chadha, 462 U.S. at 945-946. The Commission’s “proposals” constitute lawmaking. That they are masquerading as “rulemaking” is not only illegal, it is disingenuous.

The principles laid down by the Presentment Clauses were uniformly accepted by the Framers. Presentment to the President and the presidential veto were considered so imperative that the draftsmen took special pains to assure that these requirements could not be circumvented. The Framers believed that the powers conferred on Congress were to be most carefully circumscribed.

Lawmaking was clearly a power to be shared by both Houses and the President. The President's role in the lawmaking process also reflects the Framers' efforts to check whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures. It may be, at some times, on some subjects, that the President elected by all the people is more representative of them than are the members of either body of the Legislature whose constituencies are local and not countrywide. Id. at 946-948.

Bicameralism was no less important to the Framers than the presidential veto. The requirement that the nation's laws be considered and voted upon by the nation's elected officials was seen as a restraint on legislative despotism. Alexander Hamilton argued that a Congress comprised of a single House was antithetical to the very purposes of the Constitution and a sure path to the tyranny from which the Framers has recently freed themselves. In a single house there is no check, but the inadequate one, of the virtue and good sense of those who compose it. Id. at 948-949. ***What possible good could be said, then, of a single administrative body which proposes to enact a rule which would eviscerate law passed by both Houses of Congress and signed into law by the President of the United States?***

The Framers were acutely conscious that the requirements of bicameralism and presentment would serve essential constitutional functions. The President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of the Congress into two distinct bodies assured that the legislative power would be exercised after only opportunity for full study and debate in separate settings. The President's unilateral veto power, in turn, was limited by the power of two-thirds of both Houses of Congress to overrule a veto, thereby precluding final arbitrary action of one person. These procedures represent the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered procedure. Id. at 951. We are here faced with a situation in which both Houses of Congress and the President of the United States have already spoken on the topic of how reciprocal compensation and bill-and-keep should fit into the provisions governing competition at the local level.

Enacting the proposed rule will ensure that consumers most in need of affordable services will be least able to afford them. For the Commission to so re-define its own authority and to water down the meaning of the pertinent statute governing bill-and-keep without the majority of both Houses or the President agreeing to this de facto repeal is an affront to the constitutional principles laid out by the Framers. The Commission not only exercises legislative power it apparently believes was abdicated by Congress, it retains the functional equivalent of an override to a veto, which the President was never afforded the opportunity to exercise. That such power could be exercised by a body which is so secure in its power, real or imagined, is a sure recipe for the tyranny the Framers feared so much, and rightly so.

III. Even If the "Proposed Action" Were Permissible, It Defies the Intent of Congress and Hastens a Sure and Steady Path to the Anti-Competitive, Pro Monopolistic Past of the Telecommunications Industry.

The legislative history surrounding the Telecommunications Act of 1996 reveals that the purpose of the Act was to promote competition, especially among small businesses, reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers, and encourage the rapid deployment of new telecommunications technologies, particularly in rural markets. Reno v. A.C.L.U., 117 S.Ct. 2329, 2337-2338 (1997). Pub. L. 104-104, 110 Stat. 56 S.652. Senate Reports 103-367, 104-23 (§§ 3, 4, 309, 406, 703 (3, 4)), 104-230. House Reports 103-560, 104-204, 104-458. Report of Committee on Commerce, Science and Transportation on S. 652 (March 30, 1995) at pp. 10, 11, 15-17, 61, 88. Vol. 141, No. 99, Congressional Record at S8670, 8588, 8593 (§ 703 (a) (1-4)). Vol. 141, No. 158, Congressional Record at H9977 (§ 703 (a)(1-4)). Vol. 32, No. 6, Weekly Compilation of Presidential Documents (February 8, 1996) at p. 218.

The Commission concedes that competition is taking root. CLEC Order ¶ 21. *Why does it then want to tinker with the market's success?* Because CLEC's are not guaranteed a rate of return, as are ILECs, bill-and-keep will completely dismantle the foundation of the Telecommunications Act of 1996. The struggles, which CLECs are facing, are well documented, palpable and indisputable. Telecom Debt Debacle. If the only revenue carriers will receive is to come from their own customers, no one seriously contests that the "Big Boys" will always be able to charge less, because their subsidized systems are already in place, providing economies of scale unavailable to recent entrants. Then, it is simply a matter of time until all the CLECs have dried up and gone away. Sadly, this is acceptable to this Commission, in its myopic view, because "consumers can always go back to the ILECs." CLEC Order ¶ 86. It is heartless to argue that this was an acceptable result when Congress enacted the Telecommunications Act of 1996 and the President signed it into law. Under the Commission's regime, consumers face the prospect of living at the dawn of a new century: the 20th century.

From time immemorial, innovation has always sprung from the hungry start-up. Without competition, there is no incentive to improve. Without competition, there is no incentive to be more cost-effective. The lessons of the telecommunications industry bear this out. In 1984, AT&T was charging 58 ¢ per minute, transmission quality was poor, and there was talk of going all-digital in, say, 2010. Then, Sprint dropped the pin heard 'round the world. And the rest, as they say, is history.

Five years from the inception of the Telecommunications Act of 1996 is simply too short a time to start overhauling a system that hasn't even begun to give the CLECs the kind of footing they need to exist in the market given the ILEC's tremendous advantage. The current system was the basis for CLECs' business models for serving their clientele, their unsubsidized capital expenditures, their unsubsidized debt, and their ensuing entry into the market at Congress's invitation. Just as the Commission has helped AT&T, MCI, and Sprint at various times, CLECs need help in building their networks and getting strong. Congress realized this when it approved reciprocal compensation as part of the Telecommunications Act of 1996. Notwithstanding the

Commission's innuendo to the contrary, reciprocal compensation earned from terminating calls on the receiver's end is not some sort of give-away. It is a legitimate service for which Congress envisioned compensation and for which full compensation is due.

While the prospect of both parties' networks sharing the cost of completing a call may have a certain superficial appeal to some, closer examination reveals how flawed this concept is. Two scenarios based upon arcane economic models have been posited: COBAK and BASICS. COBAK discriminates in favor of ILECs/RBOCs with their networks already in place and paid for with subsidies. BASICS comes closer to Internet peering, but still favors those with large economies of scale. NPRM ¶ ¶ 22-30. Assuming one can ignore the relevant statutory and constitutional hurdles in place and still move forward with bill-and-keep, then if it must be done, at least is should be done correctly, which would mean

ELIMINATING ALL SUBSIDIES.

Level the playing field. Only then might the telecommunications industry possibly have something approaching an Internet peering model. Specifically, the FCC must eliminate per line charge for "Network Access for Interstate Calling" that benefit ILEC's with huge numbers of access lines, and per minute long distance access fees that benefit ILEC's with huge volumes of long distance traffic. The FCC's interim order reducing access fees on a permanent basis ignores the fact that ILEC's obtain huge subsidies that CLEC's do not get because ILEC's have so much long distance traffic; traffic they have accumulated over a long period of time with the help of the government.

A bill-and-keep regime means that it would now cost more to receive calls. The carriers will then recover their costs through a monthly charge or through some sort of per-minute charge. Something analogous to cell phones billing will implemented by LEC's, wherein they will start charging consumers the same rate per minute, whether the call be incoming or outgoing. A few examples illustrate how ludicrous this will be when land-line carriers start charging the same way cellular carriers do is:

(1) Auto-dial telemarketing calls designed to arrive precisely at the dinner hour will now cost the victim money.

(2) And in the cruelest cut of all—Mom would now have to share the cost of her Mother's Day call!

The bottom line for the Commission to realize is that the American people will not tolerate having their telephone costs increase in order to receive a call, wanted, unwanted, or otherwise. Calling Party Network Pays is so firmly entrenched in the landscape of the American telephone, the political fallout of upending that system would be monumental. Long gone are the days when the phone company would rent phones to pairs of callers who wish to speak to each other, and then let them put up their own phone lines.

IV. The Current Regime Instituted by the ISP Order is an Unconstitutional Infringement Upon Freedom of Speech and Freedom of Association.

Through the use of the Internet, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Reno v.

A.C.L.U., 117 S.Ct. 2329, 2344 (1997). Indeed, the First Amendment was designed to prevent the majority, through Acts of Congress, from silencing those who would express unpopular or unconventional views. Through the use of the its "interim" change in the rules governing ISP-bound traffic, the Commission unabashedly and unapologetically seeks to mute the voice of the town crier in Americans most in need of an open, convenient, and affordable forum for the free, unfettered expression of divergent views, by attacking those serving their needs and increasing the burdens on making the message known.

Unfortunately, the Commission feels this forum for exchange of free speech is undeserving of the unencumbered free speech which other end-users enjoy. For some unexplainable reason, the Commission has chosen focus on CLECs serving ISP-bound traffic. What this means is that the Commission has taken it upon itself to decide that certain voice messages are "good and pure," deserving of unfettered access, while other constitutionally-protected messages, such as those involving the Internet, are "bad and evil," and are thus to be discouraged with unnecessary and burdensome regulatory intervention. How can the Commission justify its differential treatment between data messaging and voice messaging? Of course, this action is unconstitutional.

Regulations, which permit the government to discriminate on the basis of the content of the message, will not be tolerated under the First Amendment. Regan v. Time, Inc., 468 U.S. 641, 650 (1984). A statute that has the effect of deterring speech, even if not totally suppressing speech, is a restraint on free expression. A.C.L.U. v. Reno, supra, citing Fabulous Associates, Inc. v. Pennsylvania P.U.C., 896 F.2d 780, 785 (3d Cir. 1990). By permitting certain entities to continue to deliver their messages under the current system, while compelling other speech-based businesses to incur the cost of switching over to a bill-and-keep system, and thus increasing the cost of message transmission among consumers, the Commission commits an act no different in principle than if it had attempted to require Republican political commentators to pay a registration fee before appearing on television while exempting Democratic political consultants from having to pay the registration fee. E.g., Simon & Shuster v. Crime Victim's Board, 502 U.S. 105 (1991) (financial burdens operating as a disincentive to speech impermissible).

History bears this out. Before 1996, all ISP's were using ILEC services, provided through analog phone lines. Quality was poor, digital lines were either unavailable or available only at high cost, customer service was virtually non-existent. The Telecommunications Act of 1996 heralded the entry of CLECs. Realizing the needs to be filled in this burgeoning market, CLECs provided high quality digital lines and high quality service. *This was exactly the point of the Telecommunications Act of 1996.* The Commission's new ISP rule effectively penalizes the winner! (Perhaps the Commission should have penalized Sprint for making the network sound so good in 1984.) Switching capacity is being used up by customers for whom the incentive to serve is being depleted as a result of the Commission's actions. The Commission's system may well lead to discrimination against ISPs next, plainly not an intended benefit of the Telecommunications Act of 1996. The only players in this regime that won't be penalized are the large ILECs, because they have so much traffic that ISP traffic will not affect their balance of traffic in any noticeable way.

Perhaps the Commission should consider all calls to large companies with PBXs interstate in nature and deny compensation. The rational is, of course, that they have interstate “tie lines” or the ability to do conference calls, which could include an interstate participant. Although we all know that this won’t happen because such an action would hurt the major ILEC’s, who just happen to have to have the vast majority of large business customers.

Or maybe all calls to residential customers who have three-way dialing capability should be considered interstate in nature or charge them the leaky PBX charge, since they have the ability to conference in someone from out-of state. Of course, this won’t happen either, since it would hurt the ILECs who have 99% of all residential customers nationwide.

How then does the Commission justify its conclusion that ISP-bound traffic can’t be separated into intrastate telecommunications services and interstate information service and its all-out attack on carriers who service data-intensive users such as ISPs? The content of the transmission or what the end-user does with it is beyond the CLEC’s control. It is doubtful that CLECs would even be permitted to intrude into their customers’ conversations by inquiring as to the content of the calls, data, voice or otherwise. It is flagrantly unlawful to discriminate against CLECs based upon what their customers do with the calls or how they transport their data.

The First Amendment plainly prohibits the Commission from favoring one provider over another based upon the content of the message. The proposed rule, in conjunction with the dramatic increase in cost to consumers which must result, will discourage many consumers from utilizing the services of ISPs, while completely preventing other consumers from gaining access to this vibrant and limitless source of information. Reno v. A.C.L.U., 117 S.Ct. 2329, 2337 (1997). "[G]overnment regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it." Id. at 2351. The proposed regulation will undeniably and prohibitively increase the cost of information transmission and hence discourage and hinder individuals' and society's right to receive information of public interest necessary to the sustenance of an intelligent, well-informed populace. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

The Commission cannot justify the proposed change and the ensuing impact it will have upon consumers' free speech and free association rights. The marketplace of ideas that have defined the rich history of American thought takes a back seat to no tribunal, let alone this Commission and its allegiances.

The FCC's refusal to acknowledge that ISP traffic can be categorized as interstate or intrastate violates the Tenth Amendment to the U.S. Constitution insofar as a federal agency will now be regulating traffic which each individual state has the sole, absolute and unfettered right to regulate. It is interesting that the FCC is not identifying ADSL service as inherently interstate in nature.

> "We reiterate, however, that in some circumstances, ADSL services may be appropriately tariffed as intrastate services. For example, GTE may tariff an ADSL service with the states so that those customers whose Internet use is 10 percent or less interstate may purchase the service out of state tariffs and those customers whose Internet use is more than 10 percent interstate may purchase the service out of the federal tariff." (In Re GTE Telephone Operators GTOC Tariff No. 1 GTE Transmittal No. 1148, Memorandum Opinion And Order, CC Docket No. 98-79 ¶ 8 (February 26, 1999).

This is apparently just one more instance where the FCC is willing to discriminate against the CLECs in favor of the ILECs. This obviously doesn't bother the FCC as it has made it abundantly clear that once the CLECs fail, the customer can "…just go back to the ILEC". Just like the good 'ole days!

V. The CLEC Order Ignores the Obvious Differences Between ILECs and CLECs and Denies CLECs a Compensatory Rate in the Process.

The Commission's proscription of access rates for CLECs without examination of the CLECs' actual costs is not only a complete departure from the way the Commission has dealt with CLEC access rates in the past, but it is also completely inconsistent with the way the Commission has dealt with the access rates of all other LECs. For example, the Commission previously set RBOC rates based on "price caps" that took into account the carriers' costs. The Commission continues to set cost-based rates for National Exchange Carrier Association ("NECA") carriers. Currently, there are hundreds of independent and NECA carriers whose rates exceed those of ILECs, yet the Commission has held that such rates are perfectly reasonable because they are justified by these carriers' higher costs. The fact that the Commission permits hundreds of NECA carriers to charge rates that exceed the access rate charged by ILECs demonstrates that such rates are reasonable. In fact, the Commission held **just last year** that rates that exceed the ILEC rate in a particular geographic area are not per se unreasonable. Sprint Communications Company, L.P., v. MGC Communications, Inc., 15 F.C.C. Rcd. 14027 (2000). Once again, in adopting its access rate prescription exclusively for CLECs the Commission refused to distinguish this prior precedent in its CLEC Orde*r*. **An agency order that departs from prior precedent without any reasoned explanation is, by**

definition, arbitrary and capricious action that must be vacated. See, AT&T Corp. v. FCC, 236 F.3d 729, 736-37 (D.C. Cir. 2001) ("The FCC 'cannot silently depart from previous policies or ignore precedent'") (citing Committee for Cmty. Access v. FCC, 737 F.2d 74, 77 (D.C. Cir. 1984)); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970) ("an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored").

CLECs are not similar to large ILECs at all. In fact, CLECs can be far more closely compared to NECA carriers and other independent ILECs, which possess similar geographic scope and similar customer dispersion patterns. The Commission has already acknowledged that a CLEC's access costs are likely to be higher than those of ILECs due to "the CLECs' higher start up costs for building new networks, their small geographic service areas, and the limited number of subscribers over which CLECs can distribute costs." Sprint v. MGC at ¶ 6. Simply put, "a CLEC's costs may not be comparable to those of an ILEC." Id. (While ILECs access rates have dropped from just a few years ago, the Commission ensured that the ILECs would not lose revenues by enacting the per line charge for "Network Access for Interstate Calling" to the tune of approximately $4.35 per line, per month on residential lines, a tremendous boon to ILECs, given the number of lines they control.) Until now, the Commission has never taken the position that carriers with higher costs cannot charge rates that allow them to recover their costs. Yet, the Commission casually ignored its prior analysis without any plausible reasoned explanation for the departure.

Moreover, the Commission directly contradicted itself within one month of the issuance of the CLEC Order when it found in the *BTI* order that CLECs most closely resemble small, urban ILECs (*i.e.,* NECA carriers). Both analyses cannot be true at the same time: a CLEC cannot have access cost characteristics similar to a huge ILEC with incredible economies of scale and to a relatively tiny, high-cost NECA carrier. The Commission's remarkable and consistent willingness to state completely contradictory conclusions within such a narrow time frame underscores the arbitrary and capricious nature of the rate prescription in the CLEC Order. Commissioner Furchtgott-Roth aptly describes this ability in terms of the Commission's tendency to make up whatever rule suits its fancy at a given moment. ISP Order at 66, 69.

The public interest, embodied by the 1996 Act, is served by a fully competitive market for local phone service. The Commission has recognized that anything that gives the ILECs a price advantage undermines this Congressionally mandated competition. In a different proceeding, the Commission rejected a state-sponsored mechanism to subsidize ILEC services, because competitors would lose customers to the incumbent monopolies:

> [N]on-ILECs would be left with two choices — match the ILEC's price charged to the customer, even if it means serving the customer at a loss, or offer the service to the customer at a less attractive price. . . . A mechanism that [effectively causes lower ILEC prices] thus may give customers a strong incentive to choose service from ILECs rather than competitors.

<u>Western Wireless Corporation</u>, Order, 15 F.C.C. Rcd. 16227, 16231 (2000).

Further, depriving CLECs of crucial revenues inevitably will lower facility and equipment investment and upgrades, as well as operating capabilities — all reducing quality of services. Courts have recognized that CLECs depend on superior service to keep customers, and customers that are provided degraded service

> will probably switch back to [the ILEC] and turn a deaf ear to future entreaties from [the CLEC.] Adverse publicity will also deter other prospective customers from considering [the CLEC]. Even assuming the problems are eventually resolved, that may not be soon enough to save [the CLEC].

US West Communications, Inc. v. TCG Oregon, 31 F. Supp. 2d 828, 837 (D. Or. 1998); accord, MCI Telecommunications Corp. v. Michigan Bell Tel. Co., 79 F. Supp. 2d 768, 775 & 776-77 (E.D. Mich. 1999) (the impact of reduced quality service "could be substantial, steering its current or potential customers away from the [CLEC] and creating long-standing harm to its reputation").

Congress enacted the landmark Telecommunications Act of 1996 to encourage CLECs to enter the market for local telephone services and provide an alternative to the Baby Bell companies that dominated that market for decades. Indeed, the purpose of the Act was:

> to provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and service to all Americans by opening all telecommunications markets to competition. . . .

S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. at 1 (1996). *See also* Pub. L. No. 104-104, 110 Stat. 56, 56 (1996) (The purpose of the 1996 Act is "to promote competition"). **To prevent a mass exodus of customer to the ILECs resulting from the collapse of the CLEC market, which has been preordained by the Commission's recent actions, the Commission's safest and only truly sensible option would be a reciprocal compensation regime which recognizes the obvious and indisputable need of smaller carriers to charge more, concurrently with the greater service they are able to**

provide, until such time as they acquire substantial market share. The best determinant of market share naturally is the number of lines a CLEC handles. A more equitable solution to the perceived "problem" which the IXCs have concocted, would be a sliding scale allowing certain level of charges up to a certain number of lines, decreasing to a lower charge as the number of lines increases, and finally bottoming out when or if a CLEC ever achieved true competitive parity with its corresponding ILEC. At that point, and not a minute sooner, the Commission will be able to say in all candor that the goals of the Telecommunications Act of 1996 have been met.

Respectfully submitted,

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BY: ____________/S/__________________________

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